Office-Supreme Court, U.S.
FILED
MAY 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1915

In the Supreme Court of the United States

October Term, 1980

FLOREAL DELAGARZA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN C. HUMPAGE
(Counsel of Record)
HUMPAGE, BERGER AND HOFFMAN
314 West Seventh Street
Topeka, Kansas 66603
(913) 235-3477
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Whether a defendant may be convicted under an indictment alleging a substantive violation of 21 U.S.C. §841(a)(1) that avers possession of "cocaine, a Schedule II, narcotic drug" when the government's evidence established that cocaine was not a narcotic drug and the trial court did not take judicial notice that cocaine was in fact a narcotic drug.

TABLE OF CONTENTS

Questions Presented I
Opinion Below 1
Jurisdiction 2
Constitutional and Statutory Provisions Involved 2
Statement of the Case 2
Reasons for Granting the Writ 4
I. The Tenth Circuit's decision directly conflicts with the decisions by the Sixth Circuit and by the United States Court of Military Appeals, along with existing precedent of this Honorable Court 4
Conclusion 9
Appendices—
Appendix A—Court of Appeals Opinion A1
Appendix B—
21 U.S.C. §802(16) B1
21 U.S.C. §812(b) B1
21 U.S.C. §841(b)(1) B3
Federal Rule of Evidence 201 ..... B4

Table of Authorities

CASES

Dunn v. United States, 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) 5
Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1886) 4
Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed. 2d 207 (1961) 7, 8

PRECEDING PAGE WAS BLANK

Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) 4
Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) 4
United States v. Jones, 580 F.2d 219 (6th Cir. 1978) 6, 7
United States v. Williams, 3 MJ 155 (C.M.A. 1977) 7

STATUTES

18 U.S.C. §2 2
21 U.S.C. §801 *et seq.* 4
21 U.S.C. §802(16) 2
21 U.S.C. §812(b) 2
21 U.S.C. §841(a)(1) 2
21 U.S.C. §841(b)(1) 2
21 U.S.C. §846 2
28 U.S.C. §1254 2

REGULATIONS AND OTHER AUTHORITIES

Federal Rule of Evidence 201(g) 2, 6

No.

In the Supreme Court of the United States

October Term, 1980

FLOREAL DELAGARZA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Floreal Delagarza, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit affirming the conviction of the petitioner in the United States District Court for the District of Kansas on June 3, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 2, 1981. The petitioner's request for rehearing and for rehearing *en banc* was denied on April 9, 1981. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This proceeding involves the provisions of 21 U.S.C. §§802(16), 812(b), and 841(b)(1); Federal Rule of Evidence 201, along with the Fifth and Fourteenth Amendments. The provisions are reproduced in Appendix B herein.

STATEMENT OF THE CASE

The petitioner in this case was indicted on April 1, 1980, on two counts, one for possession of cocaine with intent to sell in violation of 21 U.S.C. §846, the other for possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1). Prior to trial, the government dismissed Count I of the Indictment and the trial was held solely as to Count II.

Count II of the Indictment charged that the defendant "did knowingly and intentionally possess with intent to distribute a controlled substance, to-wit: cocaine, a Schedule II, *narcotic drug,* in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2." (Emphasis added). At trial, the government called upon Ronald Wagenhofer, a Drug Enforcement Administration chemist to identify certain

materials seized at the time the defendant was arrested. The defendant was present at the residence of another individual on March 22, 1980, when federal agents made a "drug bust". Wagenhofer identified the substance as 46% cocaine. However, he also testified on direct examination that cocaine is not a narcotic drug and reiterated that statement on cross-examination. The witness further testified "legally I believe, I haven't looked at the law recently, but I believe it is classified as a narcotic." The court's opinion reflecting that the witness testified "it is legally classified as a narcotic." (Slip Op. at A3).

At the close of the government's evidence, the defendant moved for judgment of acquittal on the ground that the government's evidence did not show cocaine was a narcotic drug. The motion was overruled by the trial court. Thereafter, the trial court made no attempt to follow the procedures specified in Federal Rule of Evidence 201 for taking judicial notice as to whether cocaine is a narotic drug. Moreover, it did not instruct the jury as to whether cocaine is a narcotic drug, telling the jury only that cocaine is a "controlled substance". In fact, the trial court did not rule upon the petitioner's requested instructions and did not allow counsel for the petitioner to review his proposed instructions prior to giving them to the jury.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's decision directly conflicts with the decisions by the Sixth Circuit and by the United States Court of Military Appeals.

In its opinion in this case, the Tenth Circuit noted that several courts, including the Tenth Circuit, have upheld the classification of cocaine as a Schedule II controlled substance for purposes of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §801 *et seq.* (Slip Op. at A3-A4). The petitioner does not quarrel with that statement but does contend that it does not relieve the government of its obligation to offer sufficient proof to make a *prima facie* case supporting conviction for the crime for which he was charged, possession with intent to distribute cocaine, which the government in the indictment termed a "Schedule II, narcotic drug." Thus, the government charged the petitioner with possession of a narcotic and was required to prove that charge. It is fundamental that an indictment, as the product of a grand jury, is not subject to amendment by the Court or by the prosecutor. *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962); *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); *Ex parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1886).

The Tenth Circuit suggests in its opinion that mere proof that the petitioner possessed cocaine was sufficient because cocaine is classified as a controlled substance. Such a conclusion flies in the face of decisions by this Court because it means that the petitioner was convicted for a crime different from that with which he was charged. Moreover, no instruction was given by the trial court to the jury as to the element charged in the indictment—that cocaine is a narcotic drug. As was stated by this Court in

Dunn v. United States, 442 U.S. 100, 106, 99 S.Ct. 2190, 2194, 60 L.Ed.2d 743 (1979):

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. *See Eaton v. City of Tulsa,* 415 U.S. 697, 698-699, 94 S.Ct. 1228, 1229-1230, 39 L.Ed.2d 693 (1974) (per curiam); *Garner v. Louisiana,* 368 U.S. 157, 163-164, 82 S.Ct. 248, 251-252, 7 L.Ed.2d 207 (1961); *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948); *DeJonge v. Oregon,* 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 2d 278 (1937). There is, to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal. The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September statement itself. But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial. As we recognized in *Cole v. Arkansas, supra,* 333 U.S., at 201, 68 S.Ct., at 517, "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

Thus, the simple fact of the matter is that the government charged that the defendant possessed a narcotic but failed to produce evidence to support the charge. Establishment of that fact without direct proof required that the Court take judicial notice pursuant to Federal Rule

of Evidence 201. However, that Rule provides a specific procedure for judicial notice in a criminal case. Rule 201(g) provides in pertinent part that "[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." No such instruction was given by the trial court in this case.

In upholding the trial court's refusal to follow the proper procedure or to give the proper instruction, the Tenth Circuit created a direct conflict with decisions of the Sixth Circuit and the U.S. Court of Military Appeals. In *United States v. Jones,* 580 F.2d 219 (6th Cir. 1978), the defendant was convicted of illegally intercepting telephone conversations. At trial, the government showed that the defendant had tapped a telephone furnished by South Central Bell Telephone Company but the government offered no proof to show that the telephone company was a common carrier operating in interstate communications, a necessary element of the crime. On appeal, the Sixth Circuit rejected the government's contention that a conviction could be upheld by use of judicial notice. The court noted that no request had been made for judicial notice during trial and no instruction had been given as required by Federal Rule of Evidence 201(g). As the court stated:

> Congress intended to preserve the jury's traditional prerogative to ignore even uncontroverted facts in reaching a verdict.
>
> * * *
>
> As enacted by Congress, Rule 201(g) plainly contemplates that a jury in a criminal case shall pass upon facts which are judicially noticed. This it could not do if this notice were taken for the first time after it had been discharged and the case was on

> appeal. We, therefore, hold that Rule 201(f), authorizing judicial notice at the appellate level, must yield in the face of the expressed congressional intent manifested in 201(g) for criminal jury trials.

580 F.2d at 224.

Similarly in *United States v. Williams*, 3 MJ 155 (C.M.A. 1977), the defendant was convicted of a violation of a general regulation. The prosecution introduced no evidence as to the existence of the regulation that the defendant had supposedly violated. No request was made that the trial judge take judicial notice of the regulation. The court held that the evidence was insufficient as a matter of law because of the absence of any proof with regard to the regulation. The court stated that:

> Judicial notice is a procedure for the adjudication of certain facts or matters without the requirement of formal proof. (citation omitted.) It cannot, however, be utilized as a procedure to dispense with establishing the government's case. See McCormick, *Evidence* §§328-35 (2d ed. 1972). Absent clear indication on the record that the trial judge properly judicially noticed the regulation in a prosecution for a violation of Article 92(1), we must hold that the judge did not have before him any evidence that what the accused did was a crime.

3 MJ at 157.

Finally, in *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961), this Court reviewed convictions for disturbing the peace. The petitioners were blacks who had taken seats at a white lunch counter in a Louisiana department store. There was no evidence in the record of any unruly conduct. Before this Court, the government suggested that the trial court took judicial notice of race

relations and concluded that the petitioners' presence at the lunch counters might cause a disturbance. As was stated in response by this Court:

> There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be "to turn the doctrine into a pretext for dispensing with the trial." (citation omitted.) Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon. Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where that evidence is unknown. Such an assumption would be a denial of due process.

368 U.S. at 173.

Thus, the failure of the trial court to properly apply the doctrine of judicial notice, to cure an otherwise silent record resulted in a complete violation of the petitioner's due process rights.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the opinion and judgment of the Tenth Circuit.

Respectfully submitted,

JOHN C. HUMPAGE
HUMPAGE, BERGER AND HOFFMAN
314 West Seventh Street
Topeka, Kansas 66603
(913) 235-3477
Attorneys for Petitioner

APPENDIX

APPENDIX A

COURT OF APPEALS OPINION

PUBLISH

(Filed March 20, 1981)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-1744

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FLOREAL DELAGARZA,
Defendant-Appellant.

Appeal from the United States District Court
For the District of Kansas
(D. C. No. 80-20032-02)

John C. Humpage of Humpage, Berger & Hoffman, Topeka, Kansas, for Defendant-Appellant.

John O. Martin, Assistant United States Attorney (James P. Buchele, United States Attorney, with him on the brief), Kansas City, Kansas, for Plaintiff-Appellee.

Before BARRETT, DOYLE and LOGAN, Circuit Judges.

PER CURIAM.

Floreal Delagarza appeals from a conviction by a jury of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841. On appeal he raises two issues: (1) whether the court erred in granting the government's motion to dismiss Count I of the indictment without dismissing Count II, and (2) whether defendant's conviction under a count referring to "cocaine, a Schedule II, narcotic drug" should be overturned because evidence at trial indicated that cocaine is not a narcotic.

A federal agent of the Drug Enforcement Administration (DEA), investigating the narcotic dealings of one Hodges, made a purchase of cocaine from Hodges. Delagarza was present and participated in the transaction. The grand jury's indictment charged Delagarza, in Count I, with conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and, in Count II, with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841.

On the day of Delagarza's trial, but before the jury was impaneled, the government moved to dismiss Count I of the indictment, and the court granted the motion. After the government's opening statement, Delagarza sought a dismissal of the remaining count on the ground that the dismissal of Count I was an amendment of the indictment. The court denied that motion. Delagarza contends the trial court erred in dismissing the conspiracy count because the dismissal constituted an unlawful amendment of the grand jury's indictment. We disagree.

An indictment returned by a grand jury cannot be amended. Stirone v. United States, 361 U.S. 212 (1960);

Ex parte Bain, 121 U.S. 1 (1887). An indictment may be dismissed by the U. S. attorney prior to trial and with leave of the court, Fed. R. Crim. P. 48(a). Consent of the defendant is not necessary when, as here, withdrawal occurred before the trial is begun. *Id.* The same rule governs the dismissal of one or more counts of an indictment. *See* United States v. Valencia, 492 F.2d 1071, 1074 (9th Cir. 1974); Thomas v. United States, 398 F.2d 531, 537 (5th Cir. 1968). Thus, the dismissal of Count I of the indictment on the motion of the government did not amend or add to the indictment. Nor has it been shown that Delagarza was prejudiced. We find no constitutional error under these circumstances. *See* United States v. Noah, 475 F.2d 688 (9th Cir.), *cert. denied,* 414 U.S. 1095 (1973).

Count II of the indictment, on which Delagarza was convicted, charged possession with intent to distribute "a controlled substance, to wit: cocaine, a Schedule II, *narcotic drug,* in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2." (Emphasis added.) During trial, the government's expert testified that "physiologically, [cocaine] is a nonnarcotic" though it is legally classified as a narcotic. Delagarza contends that he should not have been convicted of possession with intent to distribute a narcotic drug when the drug was not shown to be a narcotic. We do not agree. Many courts, including this one, have upheld the classification of cocaine as a Schedule II, controlled substance in the face of arguments that it is not a narcotic. *E.g.,* United States v. Szycher, 585 F.2d 443 (10th Cir. 1978). (Congress' action of classifying cocaine as a narcotic for penalty purposes is proper regardless of medical classification). Moreover, appellant has not shown that he was prejudiced by the indictment's statement of the charge. The indictment named cocaine as a controlled substance and sufficiently identified the

elements of the crime to fairly inform appellant of the charge against him and enable him to avoid double jeopardy. *See* Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Tokoph, 514 F.2d 597, 605-06 (10th Cir. 1975). *See also* United States v. Vento, 533 F.2d 838, 871 (3d Cir. 1976). Additionally, we note Delagarza neither requested a jury instruction concerning the words "narcotic drug" nor objected to the jury instructions given on this aspect of the case.

AFFIRMED.

APPENDIX B

21 U.S.C. §802(16)
21 U.S.C. §812(b)
21 U.S.C. §841(b)(1)

Federal Rule of Evidence 201

21 U.S.C. §802(16)—The term "narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, coca leaves, and opiates.

(B) A compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates.

(C) A substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clause (A) or (B).

Such term does not include decocainized coca leaves or extracts of coca leaves, which extracts do not contain cocaine or ecgonine.

21 U.S.C. §812(b)—Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part [Oct. 27, 1970], and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) SCHEDULE I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) SCHEDULE II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(3) SCHEDULE III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) SCHEDULE IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) SCHEDULE V.—

(A) The drug or other substance has a low potial for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

21 U.S.C. §841(b)(1)—Except as otherwise provided in section 405 [21 U.S.C.S. §845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant

substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

Federal Rule of Evidence 201

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceedings, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.